BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Section 68.4(a) of the Commission's Rules	)	
Governing Hearing Aid Compatible Telephones	)	WT Docket No. 01-309
	)	RM-8658
	)	

ERRATUM

This Erratum corrects the Petition for Reconsideration and Clarification of the Cellular Telecommunications & Internet Association ("CTIA") filed electronically in the aforementioned docket on October 16, 2003, via the FCC's Electronic Comment Filing System (Confirmation Number 20031016886634). CTIA learned later that the incorrect version of its Petition was filed electronically with the FCC.

Attached is the correct electronic version of CTIA's Petition for Reconsideration and Clarification. CTIA respectfully requests that this correct version be placed in the Docket.

Respectfully submitted,

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Date: October 18, 2003

BEFORE THE
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PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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[CORRECT VERSION]

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SUMMARY

CTIA files this Petition seeking reconsideration and clarification of various aspects of the Commission's Report and Order that revoked the statutory exemption of commercial mobile radio services from the FCC's rules governing hearing aid compatibility. Specifically, CTIA urges the Commission to reconsider its adoption of the ANSI C63.19 standard in its current form, particularly since the record evidence demonstrates that additional testing of the ANSI C63.19 is necessary. The prudent and justifiable approach is to allow the appropriate standards groups to finish their analysis and subsequent revisions of the ANSI C63.19 standard, conduct the appropriate field tests, then determine whether the ANSI C63.19 standard is an "established" technical standard appropriate for the Commission to adopt as the applicable wireless HAC standard. CTIA also requests that the Commission stay the effective date of the rule while it reconsiders its decision on this specific issue.

CTIA also asks the Commission to reconsider the "25% and 50%" implementation requirements imposed upon wireless carriers and handset manufacturers. CTIA notes in its Petition that these requirements are unsupported by any reasoned analysis or data – as required by the Administrative Procedure Act.

CTIA also seeks clarification of several provisions in the FCC's HAC Order, specifically the labeling, reporting and live testing requirements and the *de minimis* exception. In seeking clarification of these specific requirements, CTIA also suggests several viable alternatives that the Commission should consider.

Finally, CTIA requests that the Commission reconsider its decision to expand the scope of the wireline HAC complaint and enforcement procedures to CMRS. CTIA demonstrates in its Petition that the FCC's wireline HAC complaint procedure is not appropriate for the wireless

industry and is not justifiable, in consideration of: 1) the dissimilar regulatory and licensing schemes governing wireline and wireless carriers, 2) the FCC's current rules and complaint procedures under Part 1, Subpart E provide ample protection for consumers, and 3) Congress gave the FCC sole authority to regulate and enforce any of its rules relating to RF interference, including RF interference between digital wireless phones and hearing aids.

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PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

The Cellular Telecommunications & Internet Association ("CTIA")[1] respectfully submits this Petition for Reconsideration and Clarification of the Commission's Report and Order[2] in the above-captioned proceeding.

I. FCC's Adoption of the ANSI C63.19 Standard Is Premature in View of the Instability and Additional Work Needed on the Standard.

A. The Commission Mandated a Voluntary, Systems-Based Standard Without Fully Considering Whether It Can Be Transformed to a Build-To Standard

In the Hearing Aid Compatibility Order ("HAC Order"), the Commission concluded that the ANSI C63.19 standard, a performance measurement standard,[3] is an "established" technical

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

[2] *See In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, *Report and Order*, WT Docket No. 01-309, FCC 03-168 (rel. Aug. 14, 2003) (hereinafter "HAC Order" or "Order").

standard for purposes of revoking the hearing aid compatibility ("HAC") exemption that Congress mandated for public mobile services.[4] The FCC also concluded that all digital wireless phones are capable of meeting the ANSI C63.19 standard. Although the Commission adopts the ANSI C63.19 standard as the applicable HAC standard for digital wireless phones, it concedes that additional work is needed on the standard.[5] While there is no "established" standard for designing and building digital wireless phones to the FCC-mandated U-3 and U-3T measurement level, it is unclear from the Commission's analysis whether the ANSI C63.19 standard must now be transformed from a performance measurement standard into a build-to standard. It is also unclear from the HAC Order whether any subsequent development and implementation of a build-to standard must consistently achieve a U3 measurement level, reduce RF emissions, incorporate t-coil coupling and still perform in accordance with the established technical standards for CDMA, TDMA and PCS 1900 digital technologies. Accordingly, CTIA seeks clarification on these issues.

It appears that the Commission's analysis in the HAC Order does not support its conclusion that the ANSI C63.19 is an established technical standard for achieving compatibility of digital wireless phones with hearing aids. In the HAC Order, the Commission explains that it changed its tentative conclusion that the ANSI C63.19 standard is not an established technical standard after it had a more thorough opportunity to evaluate the standard and obtained

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[3] ANSI, the FCC, FDA, and both the wireless and hearing aid industries have acknowledged the limitations of the ANSI C63.19 standard as a systems-based method of measuring interference, not a build to standard. *See* Comments of the American National Standards Institute Accredited Standards Committee 63 (EMC) Subcommittee 8 (Medical Devices) at 7; HIA Feb. 20, 2003, *Ex Parte* Presentation at 2; FDA July 2, 2003, *Ex Parte* Presentation at 2; CTIA Comments at 19-20; Order at ¶¶ 20, 38.

[4] Order at ¶ 44.

[5] Order at ¶ 49.

additional information from those involved in the standards development process.[6] Based on this evaluation, the Commission decided that the ANSI C63.19 appeared to be a "workable technical standard" not an established technical standard. The Commission's analysis then makes a giant leap from a "workable technical standard" to an "established technical standard" with no explanation or basis in the record that the ANSI C63.19 standard is an "established" technical standard that supports revoking the exemption.

The plain meaning of the word "established" is "to make firm or stable" "settled" or "to put beyond doubt."[7] When used in the context of standards setting process, it contemplates a fixed, proven method or approach to a technical problem wherein if one uses that approach to build and design, one will achieve the desired result, which in this case is the mandated U3 level. The term, "workable" means "capable of being worked"[8] and thus, contemplates expending additional effort to improve a method or approach so that it achieves the desired result. While the Commission concludes that a the ANSI C63.19 standard is an established technical standard, its analysis only supports, at best, a finding that the ANSI C63.19 is a work in progress and is not settled with respect to achieving the desired technical outcome.

It is well settled that while a federal agency has the discretion to revoke or rescind its rules to changing circumstances, it is still "obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[9] Based on the analysis in the HAC Order, the Commission has not provided a satisfactory and rational

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6 *Id*. at ¶ 43.

7 WEBSTER NINTH NEW COLLEGIATE DICTIONARY 425 (9th ed. 1991).

8 *Id*. at 1359.

9 *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 42 (1983)

basis for adopting the ANSI C63.19 standard as an established technical standard even after acknowledging that additional work on the standard is necessary.[10]

The Commission is well aware that the record in this proceeding is replete with substantial evidence demonstrating that the ANSI C63.19 standard remains incomplete with respect to field testing under multiple conditions and at various signal strengths and obtaining consistent and reliable results. While the Commission ordered reduced RF emissions and speculates on ways to achieve such reduction, there is no data or analysis in the record that suggests such methods can achieve the desired result without rigorously testing the viability of such methods on an operational wireless system.

B. The Commission Should Allow the Standards-Setting Bodies to Complete Their Work and Field Tests Before Mandating the ANSI C63.19 Standard.

In the HAC Order, the FCC encourages industry to pursue other alternatives that result in substantially equivalent or greater usability by individuals with hearing disabilities. While the Commission's intentions and encouragement are well-meaning, the unintended consequences of its decision to adopt a single technical standard provides little or no incentive for standards groups to consider other alternatives. The mandate imposed by the Commission is to achieve U3 performance level for the digital wireless only using the ANSI C63.19 standard. There is no regulatory safe harbor for manufacturers or carriers if they chose other alternatives or develop proprietary solutions that provide a different yet viable approach than the ANSI C63.19 standard.

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[10] Order at ¶ 49. *See also* John Bernhards, *FCC Chairman Michael Powell Applauds Creation of ATIS' Hearing Aid Compatibility Incubator* (last modified Sept. 5, 2003) < http://www.atis.org/PRESS/pressreleases2003/090503.htm>.

For example, the record evidence demonstrates that individuals who wear hearing aids benefit tremendously when a higher level of immunity in hearing aids is used to address the electromagnetic interference issues between hearing aids and digital electronic equipment, including digital wireless phones. The known facts regarding the development and implementation of hearing aid immunity standards in Australia and Europe corroborate that hearing aid immunity levels in the range of 75 V/m - 150 V/m provide a viable alternative for achieving the desired result not only for digital wireless phones but also to protect against interference from other digital consumer electronic equipment. Yet, there is no analysis or discussion in the HAC Order concerning the Australian and Europeans hearing aid immunity standards and the success these countries have achieved in using hearing aid immunity standards to address the same technical problem.

Instead, the Commission relies on a conclusory statement that hearing aid manufacturers have increased the immunity level in their hearing aids by 30 dB without any technical data to support such a statement. The Commission failed entirely to consider an important aspect of the problem, *i.e.,* the range of immunity levels of hearing aids manufactured in the U.S., specifically whether such hearing aids have an immunity level range of 75 V/m – 150 V/m which the Australian and European standards demonstrate is the effective range of immunity against RF interference. Nowhere in the HAC Order does the Commission examine this relevant data or articulate why such an approach is not an equally viable alternative. While the Commission summarily concludes that it is comfortable relying on HIA's commitments and market forces to address the immunity level of hearing aids,[11] there is no justification or reason for their decision to overlook hearing aid immunity standards as a viable alternative in view of the factual data

[11] Order at ¶ 59.

presented. Moreover, the Commission relies on Hearing Industry Association's statements rather than having the U.S. Food & Drug Administration, the expert agency on hearing aids, to evaluate the data in the record and opine whether hearing aid immunity standards are a viable alternative to the ANSI C63.19 standard or should be used in conjunction with the standard.

The prudent and justifiable approach is to allow the appropriate standards groups, such as the ATIS Incubator Process and the ANSI C63 Committee, to finish their analysis and subsequent revisions of the ANSI C63.19 standard, conduct the appropriate field tests, then determine whether the ANSI C63.19 standard is an "established" technical standard appropriate for the Commission to adopt as the applicable wireless HAC standard. Accordingly, CTIA seeks reconsideration of the Commission's decision to adopt the ANSI C63.19 standard in its current form as the applicable technical standard, and respectfully requests that the Commission stay the effective date of the rule while it reconsiders its decision on this specific issue.

Furthermore, to ensure that standards groups work diligently and effectively towards developing and implementing the appropriate technical standard and other viable technical alternatives, CTIA also recommends that the Commission require periodic reports from the standards groups describing their progress. Based on the results of their field tests, such reports should include recommendations as to the appropriate amount of time that it will take to implement a wireless HAC standard or other viable technical alternatives.

II. The FCC's Decision to Impose the 25% and the 50% Requirement is Arbitrary and Capricious.

In addition to adopting the ANSI C63.19 performance levels as the applicable technical standard for compatibility, the HAC Order also adopts two specific "implementation

requirements" for both wireless carriers and handset manufacturers.[12] Under the first implementation standard, Tier I carriers are required to "make available to consumers at least two phone models that meet the U3 requirements, or 25 percent of the wireless phone models it offer, whichever is greater" within two years of the effective date of the HAC Order.[13] The second implementation standard requires that 50 percent of "all phone models offered by digital wireless phone manufacturers and service providers" meet the U3 standard by February 18, 2008.[14] In mandating these implementation requirements, however, the Commission made no effort to provide any sort of reasoned analysis detailing the rationale underlying the Commission's choice of these deadlines.

Section 706(2)(A) of the Administrative Procedure Act ("APA") provides that the courts shall "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[15] In the context of agency proceedings to either promulgate or rescind rules or regulations, the courts have stated that this requirement imposes a duty on agencies to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[16] Furthermore, the courts have held that an agency's written

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12 Order at ¶ 65.

13 *Id*.

14 *Id*. at ¶ 66.

15 5 U.S.C. § 706(2)(A).

16 *State Farm*, 463 U.S. at 43 (*quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

"explanation must be sufficient to enable us to conclude that the [agency's action] was the product of reasoned decisionmaking."[17]

With regard to the first requirement – the Tier I carrier "two model or 25 percent requirement" – the Commission's Order fails to meet the reasoned decisionmaking requirement on two accounts. First, the Commission provides no data or rationale for why the "two model or 25 percent requirement" should be applied to only Tier I carriers. In fact, rather than attempt to explain or justify why only Tier I carriers are included in this requirement, the HAC Order simply ignores the issue completely, and merely provides a footnote noting which carriers fall within this definition.[18]

Second, the Commission provides no data, discussion or explanation of why the actual "two model or 25 percent standard" is appropriate. During the comment phase of the proceeding, CTIA and a number of other commenters noted that the implementation of the ANSI C63.19 standard was an on-going process, and suggested that the Commission maintain a

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17 *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) (internal quotations omitted); *see also Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002) (stating that "the Commission cannot escape the requirements that its action not 'run[ ] counter to the evidence before it' and that it provide a reasoned explanation for its action").

18 *See* Order at ¶ 65, n. 185 (defining Tier I wireless carriers). In the Enhanced 911 Phase II proceeding, the Commission actually made certain findings supporting its decision to: 1) define small, mid-sized and large carrier classes; and 2) impose different requirements on each class. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Order to Stay*, 17 FCC Rcd 14841, 14846 ("The waivers filed and the records developed in response to the waiver requests filed by the various carriers suggest that size matters when it comes to negotiations with location technology, switch, and handset vendors for the technology necessary to comply with E911 Phase II.") In this decision, however, the Commission failed to include any analysis or justification for the imposition of the "two model or 25 percent requirement" on Tier I carriers.

technologically neutral solution and "not dictate that consumers should use one digital technology over another."[19] However, in mandating the "two model or 25 percent" standard, the Commission completely ignored a consumer-driven approach, even though the Commission's own Order conceded that "consumers may be able to order a phone from the roaming partner of a local wireless carrier or directly from a wireless handset manufacturer's web site."[20] Furthermore, even in the face of such contradictory evidence, the Commission makes no effort whatsoever to justify the "two model or 25 percent" standard, and instead relies on a boilerplate statement that the requirement will "promote competition among digital wireless handset manufacturers" and ensure "that consumers have a range of options for wireless telecommunications." Such rote boilerplate language does not constitute reasoned decisionmaking.

The Commission's analysis with regard to the second requirement – that 50 percent of all phones meet the U3 standard by February 18, 2008 – is no better. In imposing this requirement, the Commission stated merely that "it is important to ensure that individuals with disabilities are not left behind as digital technology evolves and improves wireless telecommunications" and noted that consumers with hearing disabilities should not be "limited to small number of product

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19 *See* Comments of the Cellular Telecommunications & Internet Association at 19 (filed Jan. 11, 2002); *see also* Letter from Leo R. Fitzsimon, Director, Government and Industry Affairs, Nokia, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, Docket No. 01-309 (filed July 3, 2003) (noting that "adherence to current ANSI standards may not guarantee customer satisfaction in practical use").

20 Order at ¶ 69.

offerings."[21] Accordingly, the Commission somehow concluded that "providing compatibility in one half of phone models by February 18, 2008," was a "feasible and desirable interim goal."[22]

In making that statement, however, the Commission never provides any actual reason for why the 50 percent standard is a "feasible or desirable" goal. For example, the Commission never discusses why the 50 percent goal provides any additional benefit over other available options. In the context of ensuring that hearing impaired consumers have options, does a 20 percent standard provide true "choice?" What about 30 percent? Not surprisingly, the Commission provides no empirical data to support the "50 percent choice." Furthermore, if true consumer choice is the desired goal, why is a flexible program – such as the approach suggested by CTIA – inadequate? Unfortunately, the Commission provides absolutely no discussion of the analysis or decisional factors that went into determining the 50 percent standard. Such a result cannot be considered "reasoned decisionmaking," and must be reconsidered by the Commission.

III. CTIA Seeks Reconsideration and Clarification of Certain Requirements Imposed by the FCC's HAC Order.

In the HAC Order, the Commission imposed certain labeling, reporting and testing requirements that are cumbersome or unclear for both the consumers and wireless phone manufacturers and carriers. As discussed below, CTIA seeks reconsideration and clarification of certain aspects of these requirements and provides constructive recommendations on ways to improve the consumer's experience and at the same time diminish the administrative burden on the industry.

A. Labeling Requirements

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21 *Id*. at ¶ 72.

22 *Id*. at ¶ 73.

The Commission's HAC Order requires manufacturers to place a label on the exterior packaging of wireless phone indicating the U-rating of the digital wireless phone. In addition to external labeling, manufacturers are also required to include more detailed information on the ANSI standard in a product insert or the phone manual. Wireless phone manufacturers and carriers are concerned that providing the U-rating on the exterior packaging is meaningless to a consumer who is not technically savvy with the U-rating system. The wireless industry's extensive experience with the CTIA Certification Mark and SARs labeling issue has shown us that consumers have a strong preference for a quick and easy way to identify whether a product meets a certain level of performance through the use of a seal, a word or some other simple labeling requirement. Accordingly, CTIA recommends that the FCC adopt a more consumer-friendly labeling requirement.

For example, if the digital wireless phone meets the FCC's applicable technical standard for wireless hearing aid compatibility, *i.e.,* ANSI C63.19 U-3, the exterior labeling should simply state that "Meets FCC's Wireless HAC Standard." CTIA agrees that additional information, such as the phone's actual U and UT levels, should be made available on the carriers, suppliers' and industry websites for consumers who want additional information. CTIA also acknowledges that more detailed information regarding the applicable technical standard should be placed in the manual so that such information can be explained in the appropriate context.

B. Reporting Requirements

While the Commission requires wireless carriers and handset manufacturers to report every six months on compliance efforts, the HAC Order sets forth a list of requisite information, including commercially sensitive data, that each carrier and supplier must provide in the report. For example, information related to the retail availability of compliant phones evidence ways

that carriers and suppliers compete for customers in the wireless marketplace. To make this information publicly available would have significant impact on individual carriers and suppliers.

While the Commission's FOIA rules address confidential treatment of commercially sensitive data, the rules do not provide adequate protection before submission of such data. Unfortunately, the FCC's FOIA rules contemplates a post-submission determination of confidential treatment whereby it is only after submitting the data that the Commission determines whether to grant confidential treatment. Accordingly, carriers and suppliers are very reluctant to submit such data on an individual basis. CTIA asks that the FCC clarify how it plans address this issue well before the six-month report is due.

C. Live Testing Requirement

In Paragraph 65 of the HAC Order, the Commission required carriers to make available all of their phone models that comply with the FCC's wireless HAC technical standard for consumers to test in each retail store that carriers own or operate. CTIA requests that the Commission clarify whether it is mandating that all carrier owned and operated stores must have live testing available. Should the FCC expand the mandate to carriers' direct sales outlets but not to sales agents and other third parties, the Commission must clarify whether the FCC has legal authority and the scope of that authority to require retail stores to comply accordingly.

It appears that the Commission's live testing requirement is an attempt to provide consumers with an opportunity to "test drive" the digital wireless phone with the consumer's hearing aid before purchasing a subscription. CTIA contends that such a requirement is not necessary in view of the recent implementation of the CTIA Voluntary Consumer Information

Code.[23] The Code specifically allows a minimum 14-day trial period for new service[24], and the six nationwide carriers as well as medium and small operators of wireless services have implemented this principle of the Code as well as other principles, disclosures and practices throughout their entire operations. Combined, they cover 98% of the U.S. population, including consumers with hearing aids. Thus, consumers who wear hearing aids who want to try a compliant phone with its hearing aid on a new service, has the opportunity to "test drive" the phone and new service for a minimum of 14 days and in a variety of locations, weather and traffic conditions before making a firm commitment to subscribe to the carrier's service.. In fact, the Voluntary Consumer Information Code provides a more consumer-friendly approach than the FCC's live testing requirement.

D. *De Minimis* Exception

In Paragraph 69 of the HAC Order, the Commission adopted a *de minimis* exception for manufacturers and carriers that offer a small number of handset models in the United States. However, it is unclear whether the *de minimis* exception applies to a supplier's or carrier's total activity or whether it applies on an air interface- specific basis. How the FCC responds to this issue will have a significant impact on the FCC's analysis regarding the market feasibility of revoking the HAC exemption.

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23 *See CTIA Consumer Code for Wireless Service* (visited Oct. 15, 2003) <http://www.wow-com.com/pdf/The_Code.pdf>

24 Principle Four of the CTIA Consumer Code for Wireless Service states, "When a customer initiates service with a wireless carrier, the customer will be informed of and given a period of not less than 14 days to try out the service. The carrier will not impose an early termination fee if the customer cancels service within this period, provided that the customer. complies with applicable return and/or exchange policies. Other charges, including airtime usage, may still apply." *Id.*

For example, CTIA recently learned from one of its members that its company[25] would not qualify for the *de minimis* exception under a "total activity" interpretation of the rule, and that it would be forced to either: 1) offer two compliant models in the iDEN and CDMA technologies and 25% overall, or (2) withdraw from the CDMA and iDEN markets because it is not economically feasible for the company to build two devices for each interface. Moreover, such an interpretation would have the unintended consequence of denying a valuable wireless service to customers who are deaf, hamper technological innovation and limit competition. Furthermore, in the event of a new air interface (such as WCDMA), it appears that the rules would require all carriers and manufacturers to enter the market with two compliant devices or not at all. Such a result cannot be what the Commission intended.

While the HAC Order allows a *de minimis* exception, it is not clear whether the Commission's *de minimis* exception is suppose to supercede, coexist or follow the statutory waiver provision of the HAC Act. Nowhere in the HAC Order does the Commission discuss the statutory waiver provisions for new technologies or services as it relates to the *de minimis* exception. The record is totally devoid of any data or analysis on this issue. Accordingly, CTIA respectfully requests that the FCC clarify: 1) whether the *de minimis* exception applies to a supplier's or carrier's total activity or whether it applies on an air interface- specific basis; and 2) how carriers and suppliers should apply the *de minimis* exception in relation to the statutory waiver provision for new technologies or services.

IV. The FCC's Wireline HAC Complaint Procedure Is Not Appropriate for the Wireless Industry and Is Not Justifiable.

[25] The company offers an innovative wireless device that provides significant benefits to individuals who are deaf. It offers one device for iDEN and CDMA technologies and several for GSM technologies.

In the HAC Order, the Commission inappropriately expanded the scope of its Part 68, Subpart E rules to wireless carriers to allow consumers to bring informal complaints if either wireless carriers or handset manufacturers fail to comply.[26] The Commission presumes that its current rules do not provide consumers with such an opportunity or significantly limits consumers' opportunities from filing informal complaints concerning non-compliance with the FCC's wireless HAC requirements. Such a presumption is clearly inconsistent with the facts.

Part 1 Subpart E of the FCC rules specifically allows consumers to file both formal and informal complaints against common carriers. In fact, the FCC's Disability Rights Office collects and tracks informal complaints and inquiries from consumers with disabilities, including consumers with hearing impairments. The FCC's Consumer and Government Affairs Bureau has made tremendous strides in educating consumers on how to file informal complaints, including complaints concerning wireless hearing aid compatibility issues.[27] In addition, CTIA and the FCC's CGA Bureau have had several productive meetings and an on-going dialogue on how the Commission informal complaint process can be improved so that wireless carriers can receive informal complaints within a timely period and respond to their customers, including their customers who wear hearing aids within the requisite 30 days..[28] There is nothing in the

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[26] Order at ¶ 95.

[27] The FCC's Consumer and Government Affairs Bureau's Website makes it very convenient for consumers to file complaints, *i.e.,* electronically, e-mail, phone, or facsimile.

[28] CTIA has provided numerous suggestions to CGAB to ensure that wireless consumer complaints are properly categorized. CTIA periodically provides CGAB with an updated contact list of the appropriate person(s) within its member companies who are responsible for handling general consumer complaints and disability-related complaints. CTIA also periodically meets with CGAB staff to discuss the trends in the FCC's Quarterly Reports, and has specifically asked the CGAB to provide the wireless industry with the number of disability-related informal complaints and inquiries even if such complaints do not constitute the top five categories of complaints and inquiries.

record to suggest that the FCC's existing rules and procedures under Part I, Subpart E are inadequate or ineffective in providing consumers and the FCC with appropriate complaint and enforcement procedures. There is no justification for the FCC to expand the scope of the wireline HAC complaint procedure to wireless manufacturers and carriers.

Moreover, the HAC Order imposes a wireline mandate without any examination or evaluation of the regulatory scheme that Congress mandated for Commercial Mobile Radio Services. The Part 68 rules contemplate a dual-regulatory structure where the FCC and states share jurisdiction with respect to services offered by wireline telecommunications providers. This shared jurisdiction is founded upon the principle that the location of landline common carrier service can be defined within finite geographical boundaries, and that for the most part, interstate and intrastate wireline services are separable.

The mobile nature of wireless telecommunications service and the Commission's licensing scheme for commercial mobile radio services do not abide by state boundaries. As the Commission has often acknowledged, it is virtually impossible to regulate commercial mobile radio services under a traditional landline regulatory structure.. Moreover, wireless hearing aid compatibility is a RF interference issue. The Commission's exclusive authority over RF interference is clearly delineated in the Communications Act and Commission precedent.[29]

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[29] *See e.g.*, 47 U.S.C. §§ 302a(a), 303(e). *See also 960 Radio, Inc., Memorandum Opinion and Declaratory Ruling*, FCC 85-578, 1985 WL 193883 (1985); *MobileComm of New York, Inc., Memorandum Opinion and Declaratory Ruling*, 2 FCC Rcd 5519 (1987); *Petition of Cingular Wireless, L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission, Memorandum Opinion and Order*, WT Docket No. 02-100, DA 03-2196 (rel. July 7, 2003).

Several federal courts have consistently upheld and reaffirmed that state regulation governing RF interference is preempted under the Communications Act.[30]

To expand the scope of Part 68 to allow states to regulate and enforce the FCC's wireless HAC rules is inappropriate for the CMRS regulatory scheme and unnecessary in view of the FCC's current rules and procedures under Part 1, Subpart E. Moreover, such an expansion is unjustifiable under the Communications Act and the judicial progeny of cases preempting state regulation of RF interference. Accordingly, CTIA seeks reconsideration of the Commission's decision to impose Part 68 complaint procedures upon commercial mobile radio services.

[30] *See Southwestern Bell Wireless v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999); *Freeman v. Burlington Broadcasters, Inc*., 204 F.3d 311 (2nd Cir. 2000)

CONCLUSION

Based on the foregoing discussion, CTIA respectfully requests that the FCC reconsider and clarify certain provisions of the FCC's HAC Order as delineated by CTIA in this Petition.

Respectfully submitted,

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